A **ALLOY CONSOLIDATED SDN BHD & ANOR**

v.

DATO' DR HJ ADAM HARUN

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
HASHIM YUSOFF FCJ
JAMES FOONG FCJ
[CIVIL APPEAL NO: 03(I)-1-2008(W)]
C 16 MAY 2011

CIVIL PROCEDURE: *Pleadings - Counterclaim - Filing of counterclaim - Whether counterclaim deemed to be a separate action - Limitation Act 1953, s. 31 - Whether applicable - Whether counterclaim* D *barred by limitation - Rules of the High Court 1980, O. 20 r. 5*

This was an appeal against the decision of the Court of Appeal dismissing the appeal of the appellants ('the plaintiffs') against the respondent ('second defendant'). Leave to appeal was granted by this court on, *inter alia*, the following question (i) whether s. 31 E Limitation Act 1953 ('the Act') was relevant to the exercise of discretion under O. 20 r. 5(5) Rules of the High Court 1980 where leave was sought to amend a defence to introduce a fresh counterclaim.

F **Held (dismissing the appeal)**
Per Arifin Zakaria CJ (Malaya) delivering the judgment of the court:

(1) The court may at any stage of the proceedings allow either G party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. The rule permits amendments at any stage and it does not matter H whether the original mission arose from negligence or carelessness but such amendments are allowed only when they occasion no injury and cause no injustice to the opposite party or where they can be sufficiently compensated by costs or other terms imposed by the court (O. 20 r. 5 of the Rules of I the High Court 1980). (paras 25 & 26)

(2) In the present appeal, the plaintiffs took objection to the counterclaim on the sole ground that it was filed outside of the relevant limitation period. Herein, the counterclaim was a claim on contract, and the applicable limitation period would be six years from the date of the accrual of the cause of action (s. 6(1)(a) Limitation Act 1953). Taking the date of the alleged breach as February 1998, as pleaded by the plaintiffs, the limitation period would have expired sometime in February 2004. The counterclaim was filed on 9 July 2004. Therefore, had it been filed as a fresh action it would have been barred by limitation. However, since it was filed as a counterclaim s. 31 of the Act would apply. (para 30)

(3) The counterclaim was not barred by limitation. This was so because by virtue of s. 31 of the Act, the counterclaim was deemed to be a separate action and to have been commenced on the same date as the action in which the counterclaim was pleaded *ie*, 25 June 2001. In other words, the date of filing of the counterclaim related back to the date of the original action. Thus, taking the cause of action as accruing in February 1998, as pleaded by the plaintiffs, the second defendant was well within the six years period on the date this action was commenced by the plaintiffs. Therefore, the counterclaim could not be said to be time barred. (para 33)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Rayuan menolak rayuan perayu-perayu ('plaintif-plaintif') terhadap responden ('defendan kedua'). Kebenaran merayu diberikan oleh mahkamah atas, antara lain, persoalan berikut (i) sama ada s. 31 Akta Had Masa 1953 adalah relevan kepada pelaksanaan budibicara di bawah A. 20 k. 5(5) Kaedah- Kaedah Mahkamah Tinggi 1980 di mana kebenaran dipohon untuk meminda pembelaan supaya dapat memperkenalkan tuntutan balas yang baru.

Diputuskan (menolak rayuan)
Oleh Arifin Zakaria HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Mahkamah pada bila-bila peringkat prosiding boleh membenarkan mana-mana pihak untuk mengubah atau meminda pliding-pliding dengan cara atau dengan terma yang

A adil dan segala pindaan yang diperlukan dibuat bagi tujuan memutuskan persoalan kontroversi di antara pihak-pihak. Kaedah membenarkan pindaan pada mana-mana peringkat dan ia tidak penting sama ada misi asal berbangkit dari kecuaian tetapi pindaan-pindaan itu dibenarkan hanya apabila ia tidak B menyebabkan kerosakan atau ketidakadilan kepada pihak bertentangan atau di mana mereka boleh digantirugi sepenuhnya melalui kos atau apa-apa terma lain yang telah dikenakan oleh mahkamah (A. 20 k. 5 Kaedah-Kaedah Mahkamah Tinggi 1980).

C

(2) Di dalam rayuan ini, plaintif-plaintif membantah tuntutan balas atas alasan bahawa ia telah difailkan di luar tempoh had masa yang relevan. Di sini, tuntutan balas adalah tuntutan kontrak, dan tempoh had masa yang terpakai adalah enam tahun dari D tarikh terakrunya kausa tindakan (s. 6(1)(a) Akta Had Masa 1953). Mengambil tarikh berlakunya kemungkiran sebagai Februari 1998, seperti yang diplidkan oleh plaintif-plaintif, tempoh had masa sepatutnya luput pada Februari 2004. Tuntutan balas telah difailkan pada 9 Julai 2004. Oleh itu, jika E ia telah difailkan sebagai tindakan yang baru ia akan dihadkan oleh had masa. Oleh itu, kerana ia difailkan sebagai tuntutan balas, s. 31 Akta digunapakai.

(3) Tindakan balas tidak dihadkan oleh had masa. Ini adalah F disebabkan s. 31 Akta, tuntutan balas adalah disifatkan sebagai tindakan yang lain dan dimulakan pada tarikh yang sama seperti tindakan di mana tuntutan balas diplidkan iaitu 25 Jun 2001. Dengan kata lain, tarikh pemfailan tuntutan balas berhubungan dengan tarikh tindakan original. Oleh itu, G mengambil kausa tindakan sebagai terakrunya pada Februari 1998, seperti yang diplidkan plaintif-plaintif, defendan kedua adalah dalam tempoh enam tahun pada tarikh tindakan ini dimulakan oleh plaintif-plaintif. Oleh itu, tuntutan balas tidak boleh dikatakan sebagai dihadkan oleh had masa.

H **Case(s) referred to:**

Henriksens Rederi A/S v. P H Z Rolimpex [1973] 3 All ER 589 ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

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Legislation referred to:
Limitation Act 1953, ss. 6(1)(a), 31
Rules of the High Court 1980, O. 20 r. 5

Limitation Act 1939 [UK], s. 28

Other source(s) referred to:
Halsbury's Statutes of England, 3rd edn vol 19, p 89

For the appellants - Arthur Wang Ming Way (CM Wong & Shareena Shahril with him); M/s Arthur Wang, Lian & Assocs
For the respondent - James Selva (Normaezah Ismail with him); M/s Ong Kok Bin & Co

[Appeal from Court of Appeal; Civil Appeal Nos: W-03-179-2005 & W-03-180-2005]

[Editor's note: For the Court of Appeal judgment, please see Alloy Consolidated Sdn Bhd & Anor v. Anjaria Properties Sdn Bhd & Anor [2011] 5 CLJ 720.]

Reported by Suhainah Wahiduddin

JUDGMENT

Arifin Zakaria CJ (Malaya):

Introduction

[1] This is an appeal against the decision of the Court of Appeal dated 30 October 2008 dismissing the appellants' appeal. Leave to appeal was granted by this court on 1 December 2008 on the following questions:

Question 1

> Where counterclaims are concerned, whether leave to amend under Order 20 Rule (1), Rules of the High Court 1980 ("RHC") is limited to amendments of existing counterclaims and does not extend to the introduction of a fresh counterclaim by way of amendments.

A Question 2

Where counterclaims are concerned, whether the power of a High Court to grant leave to amend pursuant to Order 20 Rule 5(2) is limited to the granting of leave to amend existing counterclaims and does not extend to permitting the introduction of fresh counterclaims by way of amendments.

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Question 3

Whether Section 31, Limitation Act 1953 is relevant to the exercise of discretion under Order 20 Rule 5(5), RHC where leave is sought to amend a defence to introduce a fresh counterclaim.

C

Question 4

Where leave to amend pleadings "in toto", whether such an application is one which prejudices the other party in a manner that cannot be compensated and should as a matter of course, save where exceptional basis is put before the court by the applicant, be dismissed.

D

E Question 5

In connection with question 4 above, whether a court is entitled to conclude that an application for amendment of the nature described is an application lacking in *bona fide* where justification is not provided by the applicant.

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In this judgment, the appellants will be referred to as plaintiffs and the respondent as the 2nd defendant as in the trial court.

The Facts

G **[2]** The facts relevant to this appeal as distilled from the pleadings and the affidavits filed herein are briefly as follows:

The plaintiffs at all material times were involved in building and construction industry. They were contractors who had taken over four incomplete projects which were previously undertaken by the 1st defendant.

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[3] The 1st defendant is a company known as Anjaria Properties Sdn Bhd. The principal business of the 1st defendant at all material times was building industry. The 2nd defendant was at all material times the executive chairman of the 1st defendant. He is being sued in his personal capacity.

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[4] Between 18 April 1995 to 7 May 1996, the 1st defendant was commissioned by Jabatan Kerja Raya ("JKR") for the building and construction of four government projects ("the said projects"). Due to cash flow problems faced by the 1st defendant, the 2nd defendant sought the help of one Dato' Dr Nik Hussain Abdul Rahman ("Dato' Nik Hussain") to assist the 1st defendant in completing the said projects. Dato' Nik Hussain was the corporate representative of the 1st and the 2nd plaintiffs.

[5] After a series of meetings between the 2nd defendant and Dato' Nik Hussain, an understanding was reached wherein that the 2nd plaintiff would effectively take over the 1st defendant's role in the said projects. The takeover would be fronted by the 1st plaintiff as it was a bumiputra company. It was also agreed that to all intents and purposes, the 1st defendant would publicly remain as the contractor appointed for the said projects. It was also agreed that a sum of RM10,260,399.48 was to be paid to the 2nd plaintiff for the works it was to undertake.

[6] The 2nd plaintiff commenced works. At the outset, the 2nd defendant was compelled by circumstances to deal with 3rd party contractors who were originally engaged by the 1st defendant which had certain sums due and owing to them. The 2nd plaintiff requested for funds from the 1st defendant to settle the debts.

[7] The 1st defendant, through the 2nd defendant, requested the 1st plaintiff to advance the sums on the understanding that these sums will be repaid. Consequently, and with the knowledge and consent of the 1st and the 2nd defendants, a sum of RM1,200,000 was advanced by the 1st plaintiff. The 2nd plaintiff used the sum to settle outstanding debts to the said 3rd party contractors. The plaintiffs also claimed from the defendants a sum of RM2,216,404.68, which the plaintiffs said was expended by them on the said projects. Claim for this sum was made by the plaintiffs to the 1st defendant from time to time.

[8] The plaintiffs alleged that sometime in February 1998, the 1st defendant appointed contractors to replace the 2nd plaintiff and/or the 1st plaintiff. The plaintiffs contended that that constituted repudiation of the agreement between the 1st and 2nd defendants with the plaintiffs.

[9] By their solicitors' letter dated 30 April 2001, the plaintiffs accepted the repudiation and termination of the said agreement.

[10] Further, or in the alternative, the plaintiffs averred that the 1st defendant was to hold monies received from JKR for the benefit of the 2nd and/or the 1st plaintiff and to that end, the 1st defendant was at all material times, a constructive trustee of the plaintiffs over the said monies. The plaintiffs prayed for an order that the 1st and 2nd defendants jointly and severally pay damages to them. Alternatively, the plaintiffs prayed for an order that the 1st and the 2nd defendants jointly and severally, pay the sum of RM2,216,404.68 to the 2nd plaintiffs, and the sum of RM1,200,000 to the 1st plaintiff.

[11] Against the 2nd defendant, the plaintiffs averred that the 2nd defendant had deceived them by stating that the funds for the said project coming from JKR would be paid to them, although he knew at all times that the 1st defendant would not be paying either of them. In the alternative, the plaintiffs averred that the board of the 1st defendant at all times acted in concert with the 2nd defendant and as such the 1st defendant had been a participant in the deception carried out by the 2nd defendant as a joint tortfeasor. Further, or in the alternative, it was averred that the 1st and the 2nd defendants had conspired to injure the 1st and/or the 2nd plaintiff.

[12] In the High Court, the 1st and 2nd defendants filed separate defences, in which they denied liability. Essentially, they denied that the plaintiffs were entitled to any monies or at all payable by the JKR or that the 1st defendant was a constructive trustee for such monies as alleged because:

(a) There was no enforceable contract whatsoever between the plaintiffs and 1st defendant; and

(b) Even if there was a contract, the plaintiffs had by their conduct, been in breach of the contract.

The High Court

[13] By summons-in-chamber dated 6 November 2002, (encl. 18), the plaintiffs applied for summary judgments against the defendants for:

(a) The sum of RM336,683.56 which the plaintiffs alleged was advanced by them to the creditors of the first defendant who were involved in the said project, and

(b) The sum of RM2,216,404.68 for the progress claims which the plaintiffs alleged were made to the first defendant for works carried out on the said projects.

[14] On 10 May 2004, the Senior Assistant Registrar ("SAR") of the High Court entered a summary judgment against the defendants for part of the amount prayed for by the plaintiffs in encl. 18.

[15] Subsequently, the 1st defendant filed summons-in-chambers dated 30 June 2004, (encl. 38), to amend its statement of defence dated 4 September 2001. Later, the 2nd defendant also filed summons-in-chamber dated 9 July 2004, (encl. 40) to amend his statement of defence, which includes a new counter-claim. The 2nd defendant, in his counterclaim, *inter alia*, prayed for:

(i) The plaintiffs jointly and severally liable to pay the 2nd defendant for loss of investment in the sum of RM2,400,00 with interest thereon at the rate of 8% per annum from January 2004 till the date of full realization;

(ii) The plaintiffs jointly and severally pay to the 2nd defendant for lost of allowance of RM4,000 a month from January 2003 till full settlement with interest thereon at the rate of 8% per annum from January 2003 till full realization;

(iii) Costs of this action to be paid by the plaintiffs in any event; and

(iv) Such further relief or other relief as this court deems fair and reasonable to grant.

[16] On 27 August 2004, the learned SAR allowed the application in encl. 40 and the plaintiffs appealed to the learned judge against the SAR's decision ("encl. 47").

[17] On 10 January 2005, the learned SAR dismissed the application in encl. 38 with costs. And, the 1st defendant appealed to the learned judge against the SAR's decision ("encl. 52").

[18] The learned judge heard the appeals in encls. 47 and 52 together. On 26 October 2005, the learned judge dismissed the plaintiffs' appeal in encl. 47. On the same date, the learned judge allowed the 1st defendant's appeal in encl. 52.

[19] In allowing encl. 52, the High Court in a brief grounds of judgment stated:

> 1. the Plaintiffs would not in any way be prejudiced by allowing the amendment to include the counter-claim by both the First and Second Defendants as proposed. The question of whether the statute of limitation has set in at this stage is triable. The counter-claim would not prevent the Plaintiffs from entering a defence of limitation at the trial, or at an earlier stage if it so wishes by an application under O. 18 r. 19 to strike out the Defendants' counter-claim.

The Court Of Appeal

[20] Aggrieved, the plaintiffs appealed to the Court of Appeal against the decision of the High Court. The plaintiffs filed two separate appeals against the High Court decision in respect of encl. 47 and encl. 52. The Court of Appeal dismissed both appeals with costs.

[21] In the Court of Appeal, the plaintiffs contended that the 1st defendant's proposed amendment to its statement of defence includes a counterclaim which constitutes to a new cause of action, which was statute-barred. Learned counsel submitted that in his statement of defence, the 1st defendant pleaded that there was no privity of contract between it and the appellants. However, in the counterclaim the 1st defendant averred in the alternative that even if there was a contract between them, there was a breach of it by the plaintiffs.

[22] He further argued that the alleged breach occurred when the plaintiffs stopped work and the 1st defendant put in their own workers. But the 1st defendant had not, either in its statement of defence or in its counterclaim, specified when the alleged breach by the plaintiffs had occurred. The plaintiffs in their statement of claim averred that the 1st defendant had placed its worker at the construction sites at or about February 1998, that tantamount to

a repudiation of contract by conduct. Since this was not denied by the 1st defendant in either it's statement of defence or counterclaim, it must be taken to have been admitted.

[23] In the circumstances, the plaintiffs contended that the cause of action on which the proposed counterclaim was based had occurred at the latest by end of February 1998. While, the proposed counterclaim was filed on 9 July 2004 ie, five months passed the limitation period.

[24] The Court of Appeal did not agree with the plaintiffs' submission and the appeal was accordingly dismissed. Their reasons for coming to that decision are found in the following passage of their judgment which reads:

> So, section 31 of the Limitation Act 1953 is relevant and reference must be made to it. That provision is similar to section 28 of the English Limitation Act 1939. The annotation to this section in *19 Halsbury's Statute* (Third Edition) at page 89 is as follows:
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> > The effect of this section is that, if this Act is pleaded to a defence of set-off or a counterclaim, the plaintiff, in order to establish his pleas, must prove that the set-off or counterclaim was barred when he himself commenced his action and it is not enough to prove that it was barred at the time when it was pleaded.
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> Since the appellants had raised the issue of the counterclaim being barred by the Limitation Act 1953, under section 31 of the Act, they must prove that the counterclaim was barred when they commenced their action [25/6/2001]. Going by what was pleaded in the statement of claim that the cause of action had arisen at the end of February 1998, the counterclaim of the first respondent was not barred by the Act.

General Principle Governing Amendment Of Pleadings

[25] Generally, the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

[26] The rule permits amendments at any stage and it does not matter whether the original omission arose from negligence or carelessness but such amendments are allowed only when they occasion no injury and cause no injustice to the opposite party or where they can be sufficiently compensated by costs or other terms imposed by the court.

The above principles are contained in O. 20 r. 5 of the Rules of the High Court 1980 ("the RHC") which provides:

> Order 20. Amendment.
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> Rule 5. Amendment of writ or pleading with leave. (O. 20 r. 5)
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> (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
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> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
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> (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
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> (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

[27] In *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428, the Federal Court stated the right approach to be adopted in dealing with amendment of pleading. It said:

> The general principle is that the Court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit from one character into a suit of another and inconsistent character.

[28] In the case of *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126, the Supreme Court held:

> As for general principles for the granting of leave to amend:
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> It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made 'for the purpose of determining real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins L.J. in *G.L. Bakar Ltd. v. Medway Building & Supplies Ltd.* [1958] 1 WLR 1216, p. 1231; [1958] 3 All ER 540, p. 546).
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> It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... . I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of

A favour or grace ... . It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right' (per Bowen L.J. in *Cropper v. Smith* [1883] 26 Ch. D. 700, pp. 710 - 722, with which observations A.L. Smith L.J. expressed 'emphatic agreement' in *Shoe Machinery Co. v. Cultam* [1896] 1 Ch. 108, p. 112).

[29] In the present appeal, the plaintiffs did not object to the amendment to the statement of defence, however, they took objection to the counterclaim on the sole ground that it was filed outside of the relevant limitation period.

[30] In this case, the counterclaim is a claim in contract, and the applicable limitation period would be six years from the date of the accrual of the cause of action. (See s. 6(1)(a) of the Limitation Act 1953 "the Act".) Taking the date of the alleged breach as February 1998, as pleaded by the plaintiffs, the limitation period would have expired sometime in February 2004. The counterclaim was filed on 9 July 2004. Therefore, had it been filed as a fresh action, it would have been barred by limitation. However, since it was filed as a counterclaim s. 31 of the Act would apply; it provides as follows:

31. Provisions as to set-off or counter-claim.

For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

[31] This section is similarly worded as s. 28 of the English Limitation Act 1939, which is now replaced by Limitation Act 1980. The commentary on s. 28 of the English Limitation Act 1939 is applicable for our purpose. This is found at p. 89 of the *Halsbury's Statutes of England*, 3rd edn vol. 19, which reads:

The effect of this section is that, if this Act is pleaded to a defence of set-off or a counterclaim, the plaintiff, in order to establish his plea, must prove that the set-off or a counterclaim was barred when he himself commenced his action and it is not enough to prove that it was barred at the time when it was pleaded. This was formerly the rule as to set-off, but, in the case

of a counterclaim, it was formerly sufficient to prove that it was barred when pleaded (*Walkers v. Clement* [1850], 15 Q.B. 1046; *Lowe v. Bentley* [1928], 44 T.L.R. 388)

[32] This section came for consideration by the English Court of Appeal in *Henriksens Rederi A/S v. P H Z Rolimpex* [1973] 3 All ER 589. Lord Denning in that case succinctly stated the effect of the said section as follows:

I would state the effect of s. 28 in this way: Where the plaintiff owes the defendant a debt arising from a separate transaction, the defendant can raise it by way of set-off. If it is time-barred at the date when the plaintiff issues his writ, it is time-barred still. But if it is not time-barred at the time when the plaintiff issues his writ, the defendant can raise it in opposition to the plaintiff's claim without being affected by any intervening running of time. That was decided in *Walker v. Clements*, which is given statutory effect by s. 28. In that case, as in every legal set-off, the debts arose out of separate transactions.

Where the defendant has a cross-claim for damages arising from a separate transaction, he can either bring a separate action for it: in which case he is subject to the ordinary time-bar. Alternatively, he can raise it by way of counterclaim. Before 1939, if he was time-barred for separate action, he was time-barred for a counterclaim; because the counterclaim only dated from the time of its delivery: see *Lowe v. Bentley*. But by s. 28 a counterclaim, which arises out of a separate transaction, is on the same footing as a set-off. If it is not time-bared at the time when the plaintiff issues his writ, the defendant can raise it in opposition to the plaintiff's claim without being affected by any intervening running of time.

[33] Applying the above stated principles to the present case, it is clear that the counterclaim is not barred by limitation. This is so because by virtue of s. 31 of the Act, the counterclaim is deemed to be a separate action and to have been commenced on the same date as the action in which the counterclaim is pleaded ie, 25 June 2001. In other words, the date of filing of the counterclaim relates back to the date of the original action. Thus, taking the cause of action as accruing in February 1998, as pleaded by the plaintiffs, the 2nd defendant was well within the six years period on the date this action was commenced by the

A plaintiffs. Therefore, the counterclaim cannot be said to be time-barred. That is sufficient to dispose off this appeal and we do not think it is necessary for us to answer the questions in the manner they were posed to us.

B **Conclusion**

[34] For the above reasons, we wholly agree with the conclusion arrived by the Court of Appeal and accordingly the appeal is dismissed. Costs to the 2nd defendant.

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